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No. 97-2051

In The

Supreme Court of the United States

October Term, 1997

DENISE GRAFF,

Petitioner,

vs.

V & M ERECTORS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner/Plaintiff Denise Graff ("Ms. Graff") filed suit in the United States District Court for the Southern District of Florida on allegations that she had been sexually harassed by co-workers while employed with Respondent/Defendant V & M Erectors, Inc. ("V & M"). Before entry of the summary judgment against Ms. Graff, a considerable body of discovery was taken and filed with the District Court.

The statement of the case provided in the petition is misleadingly one-sided and unduly abbreviated in its depiction of the record. It also recites matters that are not supported by record evidence. For example, the claim that Ms. Graff's problems at V & M began almost immediately after she began work is refuted by her testimony that things were fine for the first five weeks she worked there. Also, the only support for the contention that Dave Sargent did not want to work with women was inadmissible hearsay. The petition also fails to fairly recount Mr. Nix' meeting with Ms. Graff.

Accordingly, it is necessary for this brief in opposition to provide a more complete and accurate account of the record. This record, resolving all disputes in favor of Ms. Graff, presents the following undisputed facts:

V & M is in the business of steel erection, and generally employs 40 to 60 workers. Vern Nix is its sole officer, director, and shareholder. V & M is a qualified minority business enterprise, heavily dependent on government contracts. If V & M failed to respond appropriately to claims of sexual harassment, its government work would be at risk.

V & M has only had one complaint, Ms. Graff's, of sexual harassment. V & M currently employs three women (excluding office personnel) who have worked without incident.

Mr. Nix testified that V & M does not condone discrimination or harassment on any basis, and that special care is taken to protect against sexual harassment:

> I have my own policy, verbal policy. If anybody ever felt they were discriminated against or had a problem on the job, they were encouraged to come and see me about it or call me and tell me what's going on.
>
> . . .
>
> This was done anytime I hired a female employee. I always went out of my way to talk to the female employees as to the working environment, and if she was familiar with the working environment, along with some communication regarding if she had a problem and was not being treated fairly or whatever or discriminated, harassed, she was to get in touch with me.

Mr. Nix follows this up by being accessible to workers, including visiting job sites and asking workers whether they have any problems. He further testified that female workers receive special attention because of the participation levels required of highway contractors by the federal government.

These policies were followed as to Ms. Graff. Mr. Nix asked Ms. Graff to let him know if she had any problems with her co-workers. As soon as he became aware of Ms. Graff's complaints of harassment, Mr. Nix directed that

she be removed from working alongside Ray or Dave Sargent, and thoroughly investigated her claims.

Ms. Graff had learned of V & M during her prior job doing iron work on bridges. She began working for V & M in April of 1994 as an apprentice iron worker.

Ms. Graff recalls that she first met Vern Nix in May of 1994, after about five weeks on the job. When she first met Vern Nix, Ms. Graff was on a project on which Dave Sargent was foreman. He asked her how she was doing, and she said "fine." Despite telling Mr. Nix things were fine, Ms. Graff testified that she found Dave Sargent "cold." "It was a very cold environment, very uncomfortable."

By all accounts, Dave Sargent does have a gruff personality. Ms. Graff had seen him being stern with other workers, and others testified similarly. V & M foremen are not executive/managerial type employees in white shirts and ties, but are working foremen doing the same kind of work as Ms. Graff.

Ms. Graff complained that Dave Sargent:

> didn't like me using the bathroom. I wasn't doing the work right because . . . I didn't know how to tie yet, and its hard to learn. It takes a couple of weeks to get to be able to do the work comfortable . . . and know what you're doing, especially when it comes to tying because you spend a lot of time tying.

However, Ms. Graff claims experience in doing iron work at her prior employment, and had been doing this work at V & M for approximately five weeks before she had

been moved to work with Dave Sargent. And she was obtaining assistance from other co-workers.

Regarding the disputation between Dave Sargent and Ms. Graff over bathroom use, Ms. Graff testified:

> I had to get my vehicle and drive to the bathroom because they didn't have the proper bathroom use on the job site. So we – I, as a female, would have to get my vehicle and leave the job site to go the bathroom.
>
> Q. Okay, because they didn't have a portalet in there?
>
> A. Well, they had them, but they're very filthy. They were filled, very disgusting.
>
> Q. Okay. Did Dave feel like you should just use that portalet?
>
> A. Yes.
>
> . . .
>
> Q. Okay. And so for the rest of the time that you were employed with Dave, you just used the portalet that was there in the area when you had to use the restroom?
>
> A. No, I'd still leave.
>
> Q. . . . [E]ven though he told you that you couldn't leave, you left anyway?
>
> A. Exactly.

Ms. Graff further complained that her working environment while on Dave Sargent's crew was unsafe in various respects. Ms. Graff complained about these matters to V & M employee Jimmy Sutton, and saw that Mr. Sutton

then approached and spoke with Dave Sargent, but she did not hear what was said.

Ms. Graff's primary complaint about Dave Sargent concerned his failure to control his brother, Ray Sargent. Ms. Graff testified that after she complained to Jimmy Sutton, Ray began verbally abusing her, brushing against her, and grabbing at her. As she further testified:

> I asked Dave . . . I didn't ask Dave. I told Dave, "Dave, I don't appreciate Ray speaking to me like that, and I don't appreciate him touching me because he has no right. Dave, "I'll take care of the problem." It was never taken care of. It just got worse.

This conversation took place after Ray Sargent ran up to her, grabbed her buttocks, and laughed and ran away. This was the first time that Ray Sargent did anything Ms. Graff found offensive.

Ms. Graff testified that, other than Dave and Ray Sargent, she got along with her co-workers. She testified that on one job:

> Ray tried to grab my buttocks again, and Dave and Jose took up for me that time and said, "Ray, keep your F-ing hands off her now."
>
> Q. Dave said that?
>
> A. Dave and Jose both. Jose was constantly telling Ray to keep his hands off me.

Ms. Graff testified that Ray Sargent "touched me . . . probably six, seven times. That's brushing up against me."

Ms. Graff further complained that Ray Sargent used offensive language around her and tried to engage her in discussions about sex. She testified that much of the harassment by Ray Sargent took place when others could not witness it.

Ms. Graff also testified that Ray Sargent once came up behind her and grabbed her breast. She responded by getting Jimmy Sutton's phone number from Dave Sargent and calling Mr. Sutton, who told her that Vern was out of town and so he (Sutton) would take care of it. "He called me back later that evening, and told me he went to Ray and Dave's house, and told them to keep their F-ing hands off me and their mouth." According to Ms. Graff's personal notes, this occurred on July 12, 1994.

Mr. Sutton described his job responsibilities with V & M as follows:

> Q. What does a superintendent do?
>
> A. As little as possible.
>
> Q. If I ask Mr. Nix what he does, what would he say?
>
> A. Made sure the jobs are running okay and tracking the materials.
>
> Q. Do you assign particular persons to work on particular jobs?
>
> A. No. He did.
>
> Q. Did you hire or fire?
>
> A. Nope.

If anyone did not show up for work, Mr. Sutton would call Vern Nix to find out what to do. In the event that Mr.

Nix could not be reached, Mr. Sutton did have limited authority to call someone in on the job if necessary. Although he had no real management authority, Mr. Sutton did respond to the limited knowledge he had of the matters complained of by Ms. Graff, first by speaking with the Sargents and directing them to behave appropriately with regard to Ms. Graff, and later by taking Ms. Graff's more serious allegation directly to Mr. Nix.

Although V & M time records show that Ms. Graff did not work August 2, 1994, she testified that she did work that day. When Jimmy Sutton called Ms. Graff and asked why she had not worked, she responded that she had worked on a bridge with Ray Sargent. Ms. Graff had her dispute over payment fixed by calling Vern Nix, who told her that he would look into it "[a]nd he did and found out that I did work that day."

Ms. Graff's early August conversation with Mr. Nix took place after each of the above-discussed events had allegedly occurred. During this conversation she did not mention any of the problems she was having, and concerned herself only with making sure she would get paid for that day. Ms. Graff also testified that she spoke to Mr. Nix on other occasions when he would move her to another job if needed, and the time records show that such transfers were not infrequent.

Ms. Graff's most ominous charge allegedly occurred shortly after her early August talk with Vern Nix, and near the end of her employment. She testified that the best evidence of the date is her handwritten notes stating that the incident occurred on Thursday, August 11, 1994, at 11:00 a.m. As Ms. Graff testified:

> A. He [Ray Sargent] said – he goes, "If you don't straighten up and quit having an attitude," he says, "I'm going to F-ing rape you. I'm going to fucking rape you."
>
> Q. Okay. Did you respond to him at all when he said that?
>
> A. I said, "Oh, you think so, huh? You and whose army?"

Then she got in her truck and left. There were no witnesses.

Ms. Graff then insisted that Jimmy Sutton contact Vern and do something about it. Ms. Graff "took it to Jimmy because [she] knew Vern was out of town." Mr. Sutton brought the issue to Vern Nix' attention, and Ms. Graff was moved to the Golden Glades project.

Ms. Graff testified that after she was moved to Golden Glades, Ray and Dave Sargent came there and Ray drew a picture of male and female genitalia on a plank, and labeled these with his name and Ms. Graff's name. Ms. Graff saw this at the end of the day. At this time she was done working for the day, and went home.

Mr. Nix first became aware of Ms. Graff's complaints by a telephone call from Jimmy Sutton. As he testified:

> A. Jimmy – I was away on vacation somewhere. I don't recall. He had called me and told me that Denise was alleging sexual discrimination and harassment from Dave and Ray, and she wasn't being treated fairly and so forth and so on.
>
> I asked him if he felt it was serious, and he said, Yeah.

> And I said, Here's what I want you to do. I advised him by phone to separate Denise from working with Dave and Ray, to work on other job sites . . . to call Dave and Ray and advise them that Denise had complained about sexual harassment and discrimination, . . . and that's what I was going to do, separate them. I took this very seriously, and I would address it when I returned.
>
> I also told him at the time to call Denise and advise her of the same, that she would not be working with Dave or Ray until I returned, and when I returned, I would be in contact with her, that this type of attitude was not condoned by my company, either on a company level or personal level. It was to be taken very seriously, and I would be in touch with her also when I returned.
>
> And I think I even asked him if Denise has a problem with that, he was to call me back and let me know. I didn't receive a phone call. . . .
>
> Q. She went to work and was separated from Dave and Ray?
>
> A. She went to work on another project. . . . I believe it was Golden Glades. . . . I know on the following Monday when I returned, she was at Golden Glades.

On his return, Mr. Nix called Ray Sargent and Dave Sargent. He advised each that he had learned of complaints by Ms. Graff, that sexual harassment would not be condoned, and that he would question each of them the next day.

Ms. Graff admits that she first complained to Mr. Nix in August, when he met her at a job site in a construction

trailer. She told Mr. Nix that "Ray had grabbed me and threatened to rape me;" and that "I've taken enough of his verbal abuse . . . and him grabbing at me when he was told not to do it." In response, "Vern told me to quit crying, that he'd take care of it. He said he'd take care of the problem."

Vern Nix told Ms. Graff that he would investigate her charges. She identified Jose Saez, Maria Soldano, Rick Schirman, and Robert Theyson as witnesses. Vern Nix also told Ms. Graff that she would not work with Ray or Dave Sargent while his investigation went forward.

Vern Nix took notes of the meeting. With minor exceptions, Ms. Graff confirmed that the notes were accurate. According to these notes, Mr. Nix went to the Golden Glades project on Monday, August 15, 1994 to meet Ms. Graff, who stated:

- Ray and Dave treated her like dirt and did not try to teach her anything.
- they tried to hurt her and overload her to make her quit.
- they verbally abused her and yelled at her a lot.
- Ray physically grabbed her on several occasions and continuously made sexual comments.
- stated she was in fear of her life and afraid of getting raped or hurt.
- dreaded going to work everyday.
- went home early on several occasions because she couldn't take it anymore.

- stated she wanted something done about this immediately.
- she let me know that if I did not do anything about this she stated she would file a complaint. [Ms. Graff does not recall threatening to file a complaint, but did say she would have to "do something about it" if Vern Nix had not taken care of the problem before she returned].
- I advised her if she wanted to file a complaint, she was within her rights to do so. However, I considered this to be an official complaint and would record it as such in our files.
- she told me she was going away on Wednesday 17th August, 1994 and would return to work on Tuesday 23rd August and would like this resolved by then.

The notes continue by recounting Mr. Nix' comments to Ms. Graff:

- I apologized for the occurrence of this situation. [Ms. Graff does not recall that Mr. Nix apologized].
- I stated thst [sic] this was not condoned nor tolerated by this company.
- I told her that I would be interviewing her, Dave and Ray.
- I asked her for names, so I could further investigate. She gave me the following names: Jose Saez, Maria Soldano, Rick Schirman and Robert Theysen.
- I told her that I would not only talk to these individuals, but would speak with other V &

M employees who have worked around the three of them. Also, I intended to interview some of the prime contractors' employees on jobs which three of them have worked together.

- I told her that I considered this to be the correct and fair way to handle this and asked her to give me a little time to do this. I told her in the interim I would not work them on the same project. I also advised her, if she had any incidents occur during this time, to let me know immdeiately [sic]. [Ms. Graff does not recall him saying this last sentence].

- I told her if I found through my investigation that her allegations are confirmed, that I had no problem terminating both Ray and Dave. However, if I could not confirm her allegations, or there was more to this situation, I would inquire as to what further procedures are to be used to deal with this probelm [sic]. I assured her this issue would not be sidestepped and I would continue to take the appropriate action in resolving this situation.

At the end of the meeting, Ms. Graff said that she was "going home," and would return on August 23rd and wanted it taken care of by then. She never came back.

Ray and Dave Sargent denied and continue to deny Ms. Graff's allegations. Thus V & M was faced with contradictory claims.

After meeting with Ms. Graff, and interviewing Ray and Dave Sargent, Mr. Nix reviewed V & M's time sheets to see who else worked around Ms. Graff and the Sargents, so as to interview others. Mr. Nix then interviewed

V & M employees: Jose Saez, Robert Theyson, Jorge Tous, Bill Meisenholder, Dan Davids, Maria Soldano, and John Sargent; and Balfour Beatty[1] employees: Keith Wagner, Clyde Stokes, Jr., and Rex Boder; all of whom failed to corroborate the central allegations of Ms. Graff's claims. Those interviewed generally reported mutual use of abusive language by Ms. Graff and Ray Sargent, but none "had any knowledge or never saw Ray or Dave abuse her, grab her or touch her." Mr. Nix documented his investigation by having each interviewee confirm a written statement.

Mr. Nix heard many comments controverting Ms. Graff's claims. Jose Saez reported:

> 1. Ray and Denise both participated in strong conversations a lot.
>
> 2. I thought that Denise wanted to fuck Ray.
>
> 3. Denise used string [sic] language a lot, not just around [sic] Ray.
>
> 4. Denise did not like to take instructions from anyone.
>
> 5. Dave did not cut her any slack because she was a female, he expected her to do the same as everybody else.
>
> 6. I feel that both Ray and Denise were out of line.

Robert Theyson had "observed Ray and Denise exchanging argumentative type conversation with each other

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[1] Balfour Beatty employees were also working on the same sites in the vicinity of Ms. Graff.

throughout the day. I thought it was their type of relationship." Jorge Tous also saw "a lot of strong comment back and forth" Bill Meisenholder stated that Ms. Graff: "had a real attitude. She went off on me. . . . She would not listen or take instructions from me. I wasn't her boss. . . . She used foul language telling me off."

Maria Soldano, a female ironworker who worked around Ms. Graff and the Sargents, told Mr. Nix:

> 1. Denise is trouble and you should get rid of her.
>
> 2. Denise and Ray spoke to each other making sexual comments about each other all the time.
>
> 3. Denise should not be complaining about the way Ray talked to her because of the way she was on the job.

John Sargent added to the chorus that: "Denise has a foul mouth and is very vocal [and] didn't take direction good."

Balfour Beatty's employees gave similar information. Clyde Stokes, Jr., commented that:

> 1. Ray's and Denise's conduct was way out of line. They both used extremely [strong] language with each other containing sexual comments and derogatory remarks to each other.
>
> 2. On one occasion I spoke to them about toning it down.
>
> 3. This type of conduct was on a continual basis.
>
> 4. Felt both were equally guilty of participating and instigating the conversations.

Balfour Beatty employee Rex Boder added that "[b]oth were involved in participating in improper conduct, both made sexual and derogatory comments to one another on a continual basis."

From his investigation, Mr. Nix could not substantiate Ms. Graff's charges. If her claims had been corroborated, he would have fired Ray Sargent, and fired or severely reprimanded Dave Sargent. Of course, V & M's employees, including the Sargents, understood that the behavior alleged by Ms. Graff was not tolerated, and there would have been serious reprisals if her claims had been found true.

On August 22, 1994, Vern Nix sent Ms. Graff a letter advising that the Department of Transportation ("DOT") was responsible for investigating complaints such as hers, and that she should call DOT's Ed Frasier for this purpose. The letter also confirmed Mr. Nix' August 15 meeting with Ms. Graff, and advised that he had already conducted several interviews. Ms. Graff did not call Mr. Frasier, but a week later she received a call from him, and was called in for an interview.

DOT investigated Ms. Graff's charges, and found after interviewing 18 persons that no one could corroborate her claims. The report notes that Ms. Graff "refused to cooperate further when requested to appear in order to offer clarity with regards to her 'eye witnesses.'"

Ms. Graff filed a charge of discrimination, but the Broward County Human Rights Division also found no probable cause to believe there was a violation. EEOC also determined that "the evidence obtained during the

investigation does not establish a violation of the statute."

Ms. Graff first filed suit against V & M in state court, but dismissed this action shortly before a scheduled summary judgment hearing. Ms. Graff's federal action came for a summary judgment hearing on March 12, 1997. At the hearing, the District Court advised both parties that because *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir. 1996), had been vacated for en banc review, the parties should argue their positions without reliance on this case. Thereafter, the court entered summary judgment in favor of V & M as to Counts I and II, and dismissed the remaining state law claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Ms. Graff appealed. By the time of oral argument before the Eleventh Circuit, certiorari had been granted by this Court to review the en banc decision in *Faragher*. *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc). Accordingly, the panel advised the parties to argue as if *Faragher* did not exist. Counsel for V & M stated that this was easily done because the same restrictions had been imposed by the district court at the hearing on the motion for summary judgment. Thereafter, the district court's ruling was per curiam affirmed "based on the district court's well-reasoned order filed on March 19, 1997." Ms. Graff's request for rehearing or rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

Ms. Graff seeks certiorari review on the contention that the decisions of the district court and of the Eleventh Circuit below conflict with decisions from other courts. In the first place, the rulings in this case readily reconcile with the authorities cited as conflicting. Secondly, any need for resolving the prior confused state of sexual harassment law has been thoroughly addressed during the 1997 term. Third, the summary judgment entered against Ms. Graff is entirely correct under this Court's most recent sexual harassment decisions. And finally, the reasons for granting certiorari should be reduced where, as here, the district court's ruling is unpublished, and the unanimous affirmance of that ruling is per curiam and unpublished.

I. There Is No Conflict.

Ms. Graff contends that the judgment against her conflicts with legal principles stated in *Bonenberger v. Plymouth Township*, 132 F.3d 20 (3rd Cir. 1997); *Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997); *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997). Her position fails to withstand close scrutiny.

Bonenberger involved a female police dispatcher who suffered harassment from a supervising sergeant, which was at times committed in front of numerous other supervisory officers. The fact that management level officials knew of the harassment for almost two months before the department's investigation defeated the otherwise sound defense that an adequate investigation commenced once the harasser's supervisor learned of the harassment. 132

F.3d at 26. The department could not benefit from its harassment policy because that policy did not specify a grievance procedure. *Id.* at 27.

Ms. Graff, however, has never alleged harassment committed in front of other management level employees. She testified that much of the harassment occurred with no witnesses. When harassment occurred in front of other co-workers, they would rush to her defense. Just as importantly, no one at V & M had any management level authority other than Vern Nix, who was the only person who could hire or fire, and who scheduled all work assignments.

In addition, Mr. Nix told Ms. Graff that if she had any problems of harassment or discrimination, she should bring them to his attention. She never did. She did not raise these alleged problems even when, shortly before she quit, she called him on his mobile telephone to get a pay matter corrected. Thus V & M's grievance policy was, in contrast with that in *Bonenberger*, clear. Ms. Graff simply failed to take advantage of it by discussing these issues with Mr. Nix.

Young involved complaints made to the plaintiff's department head, who oversaw more than sixty employees. The court held that such a person was required to either resolve harassment complaints or refer the matter to someone within the company who would. 123 F.3d at 674. That was especially true because the department head was, under the company's harassment policy, one of the authorized channels for making a complaint. *Id.* at 675.

Again, no one at V & M has authority remotely approaching that of the department head in *Young*, other than Vern Nix. Secondly, Ms. Graff knew that she had access to Mr. Nix under the policy that he personally told her about, and she failed to take advantage of that policy even when she spoke with him on a pay dispute shortly before quitting.

Torres, also cited in the petition, quotes a district court opinion suggesting that a nonmanaging employee's knowledge may impute if that employee is charged with substantial responsibility for relaying employee complaints to management, especially where management is otherwise inaccessible. *Id.* at 637 (quoting *Lamb v. Household Credit Servs.*, 956 F.Supp. 1511, 1517 (N.D. Cal. 1997)). The circumstances described in *Torres* are absent here. First, Mr. Nix was accessible. Ms. Graff had each of Mr. Nix' telephone numbers, and had spoken to him not two weeks before she quit her job and failed to raise the allegations of harassment. Second, there is no person at V & M whose substantial responsibility is in relaying employee complaints to management.

Even considering the cases selected by Ms. Graff, the summary judgment entered here would have been affirmed. V & M made an exemplary response once Ms. Graff's allegations came to the attention of Mr. Nix, its only management level employee, and Ms. Graff could have brought the matters to the direct attention of Mr. Nix in early August, when she called him on a pay issue, but she failed to mention her alleged difficulties. Given

these undisputed facts, this case does not present any clear conflict with the cases cited by Ms. Graff.[2]

V & M does not pretend that the Courts of Appeal have exhibited perfect uniformity in their approaches to imputed knowledge from lower or mid level employees to the employer. Some cases do not easily reconcile. To the extent that these differences were over announced principles, rather than over marginal differences in application of these principles, such discrepancies should be resolved by the newest cases this Court has issued on sexual harassment issues. Thus, the conflict concerns raised in the petition do not go to matters which are likely to reach into the future.

II. Sexual Harassment Law Is Now Adequately Clarified.

Up until this Court's most recent term, the confused state of sexual harassment law provided "compelling reasons," within the meaning of Rule 8, for the Supreme Court to enter the field in order to clarify the standards of liability. In a trio of new decisions however, substantial clarity has now been brought to this area of law. See *Faragher v. City of Boca Raton*, 1998 U.S. LEXIS 4216 (U.S. June 26, 1998); *Burlington Industries v. Ellerth*, 1998 U.S. LEXIS 4217 (U.S. June 26, 1998); *Oncale v. Sundowner Offshore Servs.*, 118 S.Ct. 998 (1998).

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[2] If there should be any cases which would allow liability under such facts, they are no longer good law in light of the new Supreme Court cases on sexual harassment law, as discussed in the next two sections of this brief in opposition.

The Court's new cases, and in particular *Faragher* and *Ellerth*, now provide authoritative references answering not only the specific questions there presented, but also outlining the process by which answers to other sexual harassment issues might be determined. These opinions, together with the general law of agency as outlined in the Restatement, now set the framework through which all succeeding claims of sexual and other forms of workplace harassment must be analyzed.

The Supreme Court has thus satisfied the pre-existing need for improved clarity. Having explicated the law of sexual harassment in such a treatise-like manner, the Court's resources could surely now be turned to any number of the thousands of other requests for review which are competing with Ms. Graff's petition. If, in the passage of time, there should again develop confusion in the application of sexual harassment law, a future term will be soon enough to identify and resolve these inconsistencies. Presently, however, America's courts, attorneys, employers, and employees have been given the clarification that had been needed, and there is no apparent need for further action on the part of this Court.

III. V&M's Judgment Is Correct Under *Faragher* and *Ellerth*.

Faragher and *Ellerth* announce a defense to claims of sexual harassment by a supervisor where it is shown:

> (a) that the employer exercised reasonable care to prevent and correct promptly on sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage

> of any preventive or corrective opportunities or to avoid harm otherwise.

Faragher, 1998 U.S. LEXIS at *59-*60; *Ellerth*, 1998 U.S. at *41-*42. The undisputed facts here present both elements of this defense.

First, the record is undisputed that Mr. Nix personally advised Ms. Graff that she should let him know if she had any problems with discrimination or harassment. The record further shows, without dispute, that as soon as Mr. Nix learned of Ms. Graff's allegations, he responded promptly and correctly. Mr. Nix learned of her complaint on August 10, 1994, while he was on vacation. He directed that the involved employees be separated. The next Monday, he personally interviewed Ms. Graff, Ray Sargent, and Dave Sargent. Over the next few days he personally interviewed numerous others in order to gather information to try and determine whether to believe Ms. Graff's allegations or the Sargents' denials. Mr. Nix even caused V & M to be investigated by the Department of Transportation.[3]

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[3] Ms. Graff has complained that these efforts should be discounted because no one was reprimanded. But her allegations were denied, and no one would corroborate them. Every investigation of Ms. Graff's allegations – by Vern Nix, by the Department of Transportation, and by the Broward County Human Rights Division – each concluded that her claims were unproven. Where an employee claims harassment, the claims are denied, and a good faith investigation shows that the complaint was either an exaggeration or a complete fiction, surely the employer is not subject to liability for failing to punish the exonerated party.

The record also is undisputed that Ms. Graff failed to take advantage of Mr. Nix' policy of making himself personally available to hear complaints of discrimination or harassment. We know from Ms. Graff's own testimony that Mr. Nix was readily accessible to hear and act on such complaints. She spoke with him not long after she started working on the crew where she suffered the alleged harassment, and told Mr. Nix that things were fine. She also testified that she spoke with Mr. Nix on several occasions regarding scheduling issues. It should be kept in mind that she only worked for V & M for just over three months, and so these various contacts were all over a relatively short time period.

Ms. Graff further testified that on August 2, 1994 – less than two weeks before a full in-person meeting with Mr. Nix on her harassment complaints – she learned that she was not on record for working that day. As she testified:

> Q. How did you get that fixed?
>
> A. I called Vern.
>
> Q. And what did you tell Vern.
>
> A. I told Vern that I was there at work, and he said he'd have to look into it. And he did and found out that I did work that day.
>
> Q. Okay. Do you know what he did to look into it?
>
> A. No, I don't.
>
> Q. Did he call you back later to tell you that? What –

> A. No, he just gave it to me on my next paycheck.

Ms. Graff was able to call Mr. Nix to raise this issue because she had the numbers to his mobile phone, his office, and his home.

If she was suffering the levels of harassment from her co-workers as she subsequently came to allege, Ms. Graff clearly could and should have made this known to Vern Nix on August 2, 1994, or on any of the other occasions that she spoke to him prior to that date. As the district court noted, "the record clearly indicates that Ms. Graff spoke with Mr. Nix during the time period when she was allegedly being harassed, and that she did not raise the issue of sexual harassment to him at that time." That she did not is uncontroverted proof that she could have brought her difficulties to V & M's attention sooner, but failed unreasonably to do so.

Accordingly, each element of the *Faragher/Ellerth* defense is established on the record as a matter of law. Rather than suggesting a possibly different result, these new decisions soundly confirm that the judgment against Ms. Graff is correct.[4]

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[4] The petition also contends that the district court erred in recognizing that the size and chain of command of a small company, where all management authority resides in one individual, should affect analysis of whether an employer may be held liable for harassment among co-workers. This ingredient of the district court's opinion, however, finds direct support in *Faragher*, where this Court stated:

> Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious

IV. Unpublished Per Curiam Rulings Are Less Attractive for Review.

Finally, the discretion of a Justice in deciding whether to vote for certiorari review might reasonably consider whether the rulings below have been published. Published decisions with erroneous reasoning risk spreading that error throughout the land, causing incorrect rulings affecting untold others. Published decisions are also more attractive targets for review as they are more likely to bring a thoughtful and thorough written explication of the issues and the analysis of them, thus providing a strong base from which this Court may begin its work. On the other hand, unpublished per curiam rulings often lack a thorough written justification, do not stand as precedent, and have little chance of affecting litigants beyond the parties to that specific case.

Here, no decisions have been published. The Eleventh Circuit's ruling does no more than incorporate the rationale of the district court's opinion, and so any

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> behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of the many departments in far-flung locations could be effective without some formal policy against harassment, with a sensible complaint procedure.

Faragher, 1998 U.S. LEXIS at 62. Thus, the district court was correct in recognizing that the obligations of the employer to control sexual harassment reasonably depend upon the size and chain of command of the employer, and what is reasonable for a small enterprise like V & M may not necessarily be appropriate for IBM or General Motors.

review by this Court would have only the expressed thoughts of the district court from which to begin, without the assistance of further writing from appellate judges. Because the rulings here are not likely to affect others, and because the only written analysis to work from in considering the issues Ms. Graff wants to raise is that of the district court, certiorari review is inappropriate.

CONCLUSION

Based on the foregoing, V & M requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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